# National Labor Relations Board Weekly Summary of NLRB Cases

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A.M. Ortega Construction, Inc. (21-CA-37055, 37167, and 21-RC-20823; 349 NLRB No. 105) San Diego, CA May 21, 2007. The Board adopted pro forma the administrative law judge's overruling of the Joint Petitioners' objection alleging that the Respondent engaged in objectionable conduct by granting preferential access to the Intervenor. [HTML] [PDF]

The election was held on Sept. 21, 2005, pursuant to a Stipulated Election Agreement. The tally of ballots showed 17 votes for the Joint Petitioners, 21 votes for the Intervenors, and no employees voting against representation, with 3 nondeterminative challenged ballots.

There were no exceptions to the judge's findings that the Respondent violated Section 8(a)(1) of the Act by telling employees they should quit if they supported the Joint Petitioners, telling employees that it would be futile for them to support the Joint Petitioners, threatening employees that they would be fired because they support the Joint Petitioners, and threatening employees that it would close its doors rather than sign a contract with the Joint Petitioners. Finally, there were no exceptions to the judge's dismissal of the allegation that the Respondent violated the Act by interrogating employees.

(Members Schaumber, Kirsanow, and Walsh participated.)

Charges filed by Laborers Southern California District Council; complaint alleged violation of Section 8(a)(1). Hearing at San Diego, June 26-28, and Aug. 7, 2006. Adm. Law Judge William G. Kocol issued his decision Nov. 16, 2006.

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New Concept Solutions, LLC (5-CA-30312; 349 NLRB No. 106) Baltimore, MD May 25, 2007. Affirming the administrative law judge, the Board found that the Respondent violated Section 8(a)(3) of the Act by failing to hire bargaining unit employees of Leaseway Motorcar Transport Co., the predecessor employer, to avoid having to recognize and bargain with Teamsters Local 557. The Board further held that Respondent, as the legal successor to Leaseway, violated Section 8(a)(5) by unilaterally setting initial terms and conditions of employment. [HTML] [PDF]

(Members Liebman, Schaumber, and Kirsanow participated.)

Charge filed by Teamsters Local 557; complaint alleged violation of Section 8(a)(1), (2), (3), and (5). Hearing at Baltimore, Oct. 30-31 and Nov. 1, 18, and 19, 2002. Adm. Law Judge C. Richard Miserendino issued his decision Aug. 12, 2003.

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Northeast Beverage Corp. (34-CA-10139, 10156; 349 NLRB No. 110) Bristol, CT May 25, 2007. The unfair labor practice allegations in this case arose in 2001, out of the Respondent's purchase of two beverage distributorships. The following year, the Respondent closed the smaller, unionized facility, B. Vetrano Distributors, and relocated and consolidated its operations with those at the larger nonunionized facility, Burt's Beverages. Before the closing, the

Respondent and the Union engaged in bargaining over the effects of the Vetrano closing. During one such bargaining session, on May 29, 2002, eight Vetrano delivery drivers, six of whom were scheduled to drive that day, walked off the job and drove to the union hall to seek information at the negotiating session about their job prospects. They were away from their jobs for more that 3 hours. The Respondent suspended for the rest of that day the six drivers who were to be at work and subsequently terminated five of them for their walkout. It subsequently refused to consider the five discharged drivers for hire or to hire them at Burt's. [HTML] [PDF]

The administrative law judge found that the Respondent violated Section 8(a)(1) of the Act by threatening the drivers with discipline and discharge, violated Section 8(a)(1) and (3) by suspending and discharging the drivers, and also violated Section 8(a)(1) and (3) by refusing to consider for hire, and refusing to hire, the five discharged drivers. Chairman Battista and Member Liebman adopted these findings. In dissent, Member Schaumber would reverse the judge and dismiss the allegations because he found that the walkout by these represented employees was not protected. Member Schaumber concluded that the Respondent would have discharged these five drivers and refused to rehire them even in the absence of the alleged plan to avoid employing a significant number of union-represented employees at the merged Burt's facility.

(Chairman Battista and Members Liebman and Schaumber participated.)

Charges filed by Teamsters Local 1035; complaint alleged violation Section 8(a)(1) and (3). Hearing at Hartford and New Haven, Dec. 9, 2002 and Jan. 17, 2003. Adm. Law Judge Eleanor MacDonald issued her decision Aug. 7, 2003.

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Albert Eaddy d/b/a Recana Solutions (16-RC-10754; 349 NLRB No. 109) Dallas, TX May 25, 2007. The Board found, contrary to the Regional Director, that Recana Solutions is an employer of the petitioned-for temporary day laborers; reinstated the petition filed by Service Employees Local 100; and remanded the case to the Regional Director for further processing. [HTML] [PDF]

Recana Solutions (Recana) is a sole proprietorship. In January 2005, Recana entered into a 3-year, \$6 million contract with the City of Dallas, Texas (the City), to provide temporary day laborers to work in the City's sanitation department. The Regional Director found that Recana is not "the" employer of the petitioned-for employees because, in her view, Recana "plays no actual role in the employment relationship with" the temporary day laborers. Contrary to the Regional Director, the Board found that Recana has control of some matters relating to the employment relationship involving the petitioned-for employees and, therefore, is an employer of the employees.

The Board explained, in reversing the Regional Director, that the issue is not whether Recana is "the" employer of the temporary day laborers the Petitioner seeks to represent, but rather whether Recana, a supplier of temporary labor, is "an" employer, within the meaning of

Section 2(2) of the Act of the employees. See *Management Training Corp.*, 317 NLRB 1355 (1995). In *Management Training*, the Board held that where a government entity controls most of the petitioned-for employees' terms and conditions of employment, the Board's assertion of jurisdiction over a private company with close ties to that exempt governmental entity would be based on whether the company itself meets the definition of "employer" under Section 2(2) of the Act, and whether such an employer meets the applicable monetary jurisdictional standards. The parties stipulated in this case that Recana satisfies the Board's monetary standards for asserting jurisdiction. Accordingly, the Board found that Recana is an employer of the petitioned-for employees and meets the *Management Training* test.

(Members Liebman, Schaumber, and Kirsanow participated.)

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Sweetener Supply Corp. (13-RC-21492; 349 NLRB No. 104) Brookfield, IL May 23, 2007. The Board reversed the hearing officer's recommendations to sustain the Petitioner's challenges to the ballots of Michael Pew, Mark Pelafas, and David Cohen. The primary issue is whether they were eligible to vote in a second election held on July 14, 2006. The eligibility cut off date for the election was June 18. The Employer timely submitted an updated *Excelsior* list that included the names of Pew, Pelafas, and Cohen. At the election, however, the Board agent stated that the updated *Excelsior* list was not in the file and that she would use instead the list from the first election. The Board agent challenged the ballots of Pew, Pelafas, and Cohen on the basis that their names were not on that list. [HTML] [PDF]

The hearing officer found that there was no evidence that Pelafas, Pew, or Cohen performed any bargaining-unit work on June 18. Accordingly, she concluded that none of the three employees performed bargaining-unit work during the eligibility period.

However, the Board held that "the burden of proof rests on the party seeking to exclude a challenged individual from voting," citing *Golden Fan Inn*, 281 NLRB 226, 230 fn.24 (1986).

The record showed that the three employees were in training on June 18 but did not establish that these employees did *not* perform any bargaining-unit work on June 18, either as part of the training or in addition to the training.

Therefore, the Petitioner failed to meet its burden and the Board overruled the challenges.

(Members Liebman, Schaumber, and Kirsanow participated.)

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Valley Central Emergency Veterinary Hospital (4-CA-33631, et al.; 349 NLRB No. 107) Whitehall, PA May 23, 2007. The Board majority of Members Liebman and Walsh agreed with the administrative law judge's finding that the Respondent violated Section 8(a)(5) of the Act

when it failed to abide by the Tentative Agreement negotiated on January 6, 2005, including the agreement's strike settlement terms. The majority found that on January 6, 2005, after meeting with a Federal mediator, the parties reached a Tentative Agreement which contained terms and conditions of employment. The Tentative Agreement also provided that the striking employees were to return to work on their former shifts commencing on January 7. [HTML] [PDF]

In dissent, Chairman Battista disagreed that a contract was formed when the Union agreed on January 6 to accept the Respondent's last offer. He noted that the Tentative Agreement was contingent on the approval of the complete agreement by the Respondent's Board of Directors. "Thus, since there never was an approval by the Respondent's board of directors, there never was a contract" Chairman Battista stated.

#### Member Liebman and Walsh stated:

[W]e interpret the Tentative Agreement, as a matter of law, to include both the Respondent's promise that it would present the Agreement to its board of directors *and* the promise that the Board would act lawfully in accepting or rejecting the Agreement. In any event, we cannot accept the potential consequences of the dissent's analysis, which would permit one bargaining party, acting unilaterally and in bath faith, to frustrate a contractual condition.

(Chairman Battista and Members Liebman and Walsh participated.)

Charges filed by AFSCME Local 488; complaint alleged violation Section 8(a)(1), (3), and (5). Hearing at Philadelphia, Aug. 9, 2005. Adm. Law Judge Richard A. Scully issued his decision Dec. 14, 2005.

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#### LIST OF DECISIONS OF ADMINISTRATIVE LAW JUDGES

*U.S. Recycling and Disposal, LLC* (General Chauffeurs, Sales Drivers and Helpers Local 179) Plainfield, IL May 21, 2007. 13-CA-43702; JD(ATL)-18-07, Judge George Carson II.

*Universal Dynamics, Inc.* (Association of Unadyn Field Support Technicians and an Individual) Woodbridge, VA May 22, 2007. 5-CA-33275, et al.; JD-34-07, Judge Arthur J. Amchan.

*Valley Hospital Medical Center, Inc.* (Service Employees Nevada Local 1107) Las Vegas, NV May 23, 2007. 28-CA-21047; JD(SF)-14-07, Judge Lana H. Parke.

Pacific Coast M.S. Industries Co., Ltd. (Teamsters Local 439) Tracey, CA May 25, 2007. 32-CA-22748-1, 22861-1, 32-RC-5443; JD(SF)-15-07, Judge Jay R. Pollack.

#### **TEST OF CERTIFICATION**

(In the following case, the Board granted the General Counsel's motion for summary judgment on the grounds that the Respondent has not raised any representation issue that is litigable in this unfair labor practice proceeding.)

*CCF Hotels Services, Inc. d/b/a Cleveland Clinic Guest House, et al.* (8-CA-36999; 349 NLRB No. 108) Cleveland, OH May 22, 2007. [HTML] [PDF]

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### LIST OF UNPUBLISHED BOARD DECISIONS AND ORDERS IN REPRESENTATION CASES

(In the following cases, the Board adopted Reports of Regional Directors or Hearing Officers in the absence of exceptions)

#### DECISION AND CERTIFICATE OF RESULTS OF ELECTION

Corrections Corp. of America d/b/a Northeast Ohio Corrections Center, Youngstown, OH, 8-UD-318, May 23, 2007 (Chairman Battista and Members Liebman and Schaumber) Aircraft & Electronic Specialties, Inc. d/b/a AES Interconnects, Indianapolis, IN, 25-UD-256, May 25, 2007 (Chairman Battista and Members Liebman and Schaumber)

#### DECISION AND CERTIFICATION OF RESULTS OF ELECTION

*CRP Sanitation, Inc.*, New York, NY, 2-RD-1549, May 24, 2007 (Chairman Battista and Members Liebman and Schaumber)

#### DECISION AND CERTIFICATION OF REPRESENTATIVE

Ann L. Sperry d/b/a Central Pacific Sprinkler, Co., Sacramento, CA, 20-RC-18121,
 May 24, 2007 (Chairman Battista and Members Liebman and Schaumber)
 Philly Transportation, LLC, Philadelphia, PA, 4-RD-2100, May 24, 2007 (Chairman Battista and Members Liebman and Schaumber)

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# (In the following case, the Board granted request for review of Decision and Direction of Election (D&DE) and Decision and Order (D&O) of Regional Director)

Cardinal Health 200, Inc., Montgomery, NY, 2-RC-23170, May 23, 2007 [solely with respect to Employer's Objection 2] (Chairman Battista and Members Liebman and Schaumber)

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(In the following case, the Board denied request for review of Decision and Direction of Election (D&DE) and Decision and Order (D&O) of Regional Director)

FedEx Home Delivery, an Operating Division of FedEx Ground Package Systems, Inc., Windsor, CT, 34-RC-2205, May 22, 2007 (Members Liebman and Schaumber; Chairman Battista dissenting)

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#### Miscellaneous Decisions and Orders

## CERTIFICATION OF REPRESENTATIVE AS BONA FIDE UNDER SECTION 7(B) OF THE FAIR LABOR STANDARDS ACT OF 1938

Morrison County, Little Falls, MN, 18-WH-14, May 25, 2007

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